NO. 21938

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FONSO HERRERA BOJORQUEZ,

Appellant,

vs.

ITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjuding appellant to be guilty as charged in Counts One and Two of a two count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 2231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Count One of the indictment charged that appellant, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 218 pounds of marihuana [C.R.2].[1/]

Count Two charged that appellant, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of approximately 218 pounds of marihuana knowing that it had been imported and brought into the United States contrary to law [C.R.3].

Jury trial of appellant commenced on January 25, 1967, before United States District Judge Dennis F. Donovan [C.R.5, R.T. 1-2].[2/] Appellant was found guilty on both counts on January 26, 1967, and was sentenced on February 16, 1967, to the custody of the Attorney General for concurrent five year sentences on each count, with a recommendation that he be considered for parole prior to expiration of the sentences. [C.R. 7, 8].

III

ERROR SPECIFIED

Appellant specified the following points upon appeal:

"I The circumstantial evidence does not support appellant's

1/ "C.R." refers to the Clerk's Record on Appeal.

2/ "R.T." refers to the Reporter's Transcript of Proceedings.

conviction, because it is insufficient to enable a reasonable determination that it excludes the hypothesis that appellant innocently imported the marijuana without knowing that it was in the automobile . . . (Appellant's Brief p.9).

"II Appellant was denied the effective assistance of counsel, because trial counsel failed to assert appellant's defense, in that he did not make a motion for acquittal or otherwise assert the legal insufficiency of the evidence against appellant, did not object to inadmissible hearsay offered for the purpose of discrediting the defense, and did not take any effective steps to clear up a state of complete confusion in the record as to the significance of the hearsay . . ." (Appellant's Brief p. 12).

IV

STATEMENT OF THE FACTS

On or about December 12, 1966, appellant drove a 1958 Buick into the United States from Mexico [R.T. 6-7]. At the primary inspection line, which is about 50 to 70 feet inside the United States, he presented his resident alien immigration card and was shaking a little bit [R.T.7]. He gave a negative customs declaration, but the inspector was suspicious because of the trembling and pulled up the back seat and got a glimpse of some packages [R.T. 9]. After securing another officer, appellant was escorted to secondary [R.T. 9-10].

At secondary appellant was searched with negative results, but search

f the car revealed packages concealed throughout the vehicle [C.T.14, 5-17]. The packages (contained in Government's Exhibits 1 thru 9) were nitialled, dated, and seized by Inspector McClain, and the appellant placed nder arrest [C.T. 16-17].

Customs Port Investigator Maldonado interrogated the appellant who tated that a "Roberto" had asked him to bring the car to the Mission Valley ar Wash; appellant had previously been employed there and was to ask ermission to use the equipment, polish the car and return it to Tijuana C.T. 20-22]. Appellant was unable to describe "Roberto" and did not give .s last name [C.T.22]. Appellant stated "Roberto" had given him $40.00 r the job [C.T. 23]. $56.00 was found in appellant's wallet [C.T. 24].

Customs Agent Ellis corroborated Maldonado's testimony that appellant ave only the name "Roberto" for the man who had given him the car, and frther testified that appellant did not give sufficient information on "oberto" to check him out; however, Ellis did check out the car registration hich showed the ownership as belonging to a Mr. and Mrs. Powell, and hich led from them to University Ford and then to Metorez(sic) Universal, defunct Mexican Agency [C.T. 26]. Ellis further testified that the seized ackages weighed approximately 218 pounds; that marihuana sold in Mexico i bulk for about $30.00 a kilo; that a kilo is about 2.2 pounds but when cied out only about 2 pounds; that in the United States the illicit market as $1000.00 a pound [C.T.26-27]. Ellis obtained the seized packages fm McClain and initialed and transported them to the seizure clerk

[C.T.28].

Testimony of the Assistant Seizure Clerk and the chemist completed the chain of custody of the government exhibits and identified them as marihuana [C.T. 30-32,35-37,50].

Appellant testified that a Jose Roberto Guiterez(sic) gave him the car to bring to wash and clean the upholstery and the motor; he was given $20.00 to do the work [C.T.59]. He was going to do the work at the Minuteman Car Wash in Mission Valley where he worked [C.T.59]. He had brought cars over before; facilities were better here than in Mexico [C.T. 60]. He had known "Roberto" a couple of months or so but this was the first time he had brought across a car for him [C.T.60-61]. The car was out of his sight for 15 minutes while he had breakfast [C.T. 62]. He knew nothing about the marihuana or contraband [C.T.62-63]. He was to return the car that afternoon and there was no arrangement for "Roberto"to pick it up in the United States [C.T.63]. When he was stopped at the border his car was partially in Mexican territory [C.T.65-66]. He never saw the marihuana packages and denied any knowledge of the marihuana [C.T.67-69]. He would know "Roberto" if he saw him; "Roberto" was in the car or car parts business and appellant sometimes saw him in his colony where he lived [C.T.69-70].

On cross-examination appellant admitted he only gave the name "Roberto" to the officers, stating they didn't ask for more [C.T.70]. He also admitted

there were many car wash places in Tijuana, but stated they did not have adequate equipment [C.T.71]. He stated he did not know where Guiterez(sic) lived or much about him except that he was in the car business [C.T.71].

Alfonso Rodriguez testified for appellant and stated he (Rodriguez) was employed as a manager at the Mission Valley Car Wash [C.T.75,76], and that appellant and others brought cars in from Tijuana and were allowed to work on them when he wasn't too busy [C.T.77-78]. He attempted to testify that appellant's reputation was good [C.T. 78-79], but admitted on cross-examination he had never discussed defendant's reputation [C.T.80].

Appellant's sister testified that appellant's reputation was good. [C.T. 8].

On rebuttal, Agent Ellis testified that he tried to get more information about "Roberto" but appellant did not give the rest of Roberto's name [C.T. 8]; that there were many car washing and motor cleaning facilities in Tijuana [C.T.85]; that all United States Border inspections are within the United States and appellant's car was inspected about 150 feet inside the United States [C.T.86]; that so-called mules are paid $25.00 to $100.00 for transporting marihuana across the line [C.T.86]; and that no fingerprints were taken off the car or packages [C.T.87-89]. He further testified that he contacted the manager of the Mission Valley Car Wash, Mr. Esquilera, who stated appellant had been laid off for lack of work and employees were prohibited from bringing in their own cars [C.T.89]. Ellis further testified there was a Minuteman Car Wash there also [C.T.89-90].

On surrebuttal Mr. Rodriguez testified he was the manager of the polish section as distinguished from the car wash section; that the policy had been changed with respect to use of the facilities but nevertheless workers could use them; that appellant had not worked there tor two or three months but was permitted now and then to take cars there to work on his own [C.T.92-94].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

The appellant contends that the evidence was insufficient to enable a reasonable determination that it excluded the hypothesis of innocent importation. He relies particularly upon the Davis case (Davis v. United States, No. 21,354,___F.2d____9th Cir., August 17, 1967) which differs from this case in that the contraband was found later in a sheriff's vehicle rather than in an importing car, and yet completely ignores much more similar cases such as Aguilar v. United States, 363 F.2d 379 (9th Cir.1966) and Eason v. United States, 281 F.2d 818 (9th Cir.1960).

Aguilar is almost identical with the case at bar. There the defendant drove another's car which had 98 pounds of marihuana secreted therein. Aguilar testified he had no knowledge of the contraband. The appellate court stated there was no direct evidence or admission of knowledge. The court rejected Aguilar's attack on the sufficiency of the evidence and asserted the trial judge was entitled to believe Aguilar's story "fishy" and

t draw affirmative inferences of knowledge.

Eason is even more favorable to the government, for there even the passenger as well as the driver was convicted in the face of their denials c knowledge and the fact they established the possibility that the contra- bnd could have been secreted by others without the knowledge of the apellants. In that case appellants each asserted not only the hypothesis that some stranger could have secreted the contraband without appellant's kowledge, but also the hypothesis that the other appellant had possession. Te court made short shrift of the very argument appellant makes here by siting:

"As for the alternative theory, there is no doubt that the narcotics could have been secreted in appellants' car by some stranger without their knowledge. The question, however, is whether minds of reasonable men might differ as to the reasonableness of this theory. We cannot say in this case that the theory that the narcotics were secreted by a stranger is so patently reasonable as to warrant our ruling as a matter of law that an inference of knowledge was not available from the facts of the case. We conclude that it was proper to leave this determination to the jury and that its judgment will not be disturbed."

Eason v. United States, 281 F.2d 818 (9th Cir.1960) at p. 821.

Appellant argues (p.11 his brief) that the hypothesis of innocence nee is far more convincing than it was in Davis, but in so asserting he

evidences a misconstruction of that case. Davis was not found in possession of the contraband, here the appellant was. In Davis there not only had to be an inference of knowledge but also of possession - - an inference upon an inference. Davis never had exclusive dominion and control of the car in which the contraband was found, but appellant here did. As this court has stated in Evans v. United States, 257 F.2d 121 (9th Cir.1958) at p.128:

> "Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof."

In the case at bar, as in the Eason case cited supra, the appellant appeared nervous to the primary inspector. Certainly that fact, particularly when taken in conjunction with the great value of the merchandise, appellant's failure to give "Roberto's" last name or more definitive information about him to the officers, plus the fact that there are car cleaning establishments in Tijuana should entitle the jury, as the judge in the Aguilar case supra, to believe appellant's story "fishy" and to thereby draw an affirmative inference as to knowledge. To rule otherwise would be to make this court, which does not have an opportunity to observe the witnesses and thereby judge their credibility except from the cold record, trier of the facts.

The government submits that the record in this case shows ample evidence to support appellant's conviction and that there was not "plain

error" either as to the court allowing the matter to go to the jury or as to the jury's finding of guilt.

B. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS TRIAL COUNSEL'S FAILURE TO MAKE A MOTION FOR JUDGMENT OF ACQUITTAL, TO OBJECT TO CERTAIN HEARSAY, OR TO TAKE OTHER STEPS DESIGNATED AS AN AFTER THOUGHT BY APPELLATE COUNSEL DO NOT CONSTITUTE PLAIN ERROR.

Appellant in effect argues that his trial counsel was so incompetent or inefficient as to make the trial a farce or a mockery of justice. In so doing he carries a heavy burden (Reid v. United States, 334 F.2d 915, 9th Cir.1964 at p.919), for not only is there a presumption of competency of counsel (Achtien v. Dowd, 117 F.2d 989, 992, 7th Cir.1941), but the trial judge, The Honorable Dennis F. Donovan, who alone had an opportunity to evaluate trial counsel's competency first hand, stated, "Well, gentlemen, the jury has retired, and I wish to compliment counsel for the government and counsel for the defendant in the splendid lawyer-like manner that they presented their case." [R.T.118-119, emphasis added].

Appellant argues that trial counsel's failure to move for judgment of acquittal constituted "plain error," yet government counsel and appellant counsel differ as to the import of the evidence in the record. Perhaps trial

:ounsel had read Aguilar and Eason, cited above, knew of the presumption n the statute (Title 21, United States Code, Section 176a)[3], and decided a notion for judgment of acquittal was a useless act. Is he to be second uessed on the basis of Davis which wasn't decided until nearly seven nonths after this trial? If Davis does in fact overrule Aguilar and Eason vas trial counsel incompetent for not having foreseen this? Or did such incompetency" or failure to move for judgment of acquittal make the trial farce or mockery of justice? The government submits that it did not. 'ertainly trial counsel should not have expected language in the only other ase cited by appellant (Whaley v. United States, 362 F.2d 938,939, 9th ir.1966), a perjury case unrelated to smuggling and not mentioning guilar or Eason, to have overruled them. Thus clearly there does not seem) be "plain error" with respect to trial counsel's failure to move for judg- ent of acquittal, and in view of the status of the cases at the time of ial, the court certainly didn't commit "plain error" in not granting acquittal n its own motion. And if there was not "plain error", then this court should ot consider the sufficiency of the evidence (Foster v. United States, 318 F. d 684,686, 9th Cir. 1963).

3/ "Whenever on trial for a violation of this subsection, the defendant is nown to have or to have had the marihuana in his possession, such possess- in shall be deemed sufficient evidence to authorize conviction unless the efendant explains his possession to the satisfaction of the jury."(Title 21 Inited States Code, 176a).

Appellant argues that his trial counsel's failure to object to Agent Ellis' earsay testimony of the manager of the Mission Car Wash together with his ilure to "take effective steps to clear up a state of complete confusion in ie record as to the significance of the hearsay" made appellant's conviction mockery of justice. The trouble with appellant's argument here is that efense counsel actually did take steps to clear up the matter, and, as was pparent to all present, there was no complete confusion in the record after e did so. As the record shows, and as appellant's counsel points out, all ie witnesses concerned testified interchangeably with respect to the Mission id Minuteman Car Washes. Trial counsel for appellant first moved to clear o any ambiguity or cross-examination of Agent Ellis, who when asked if the lission Car Wash was different from the Minuteman, answered, "I don't now. There is a Minuteman Car Wash there also." [R.T.90, emphasis dded]. Trial counsel then proceeded to further clarify the matter by calling ack his witness, Mr. Rodriguez, on surrebuttal. He testified that the Minuteman Car Wash is where "we polish," that "we've got one for the car as and one for the polish," and that he was manager for the polish section [R.T.92]. It was obvious to those present that the Minuteman and Mission Car Washes were two separate parts of the same business, one for washing id one for polishing, and a careful reading of the record verifies this. Such ee the problems of analyzing the cold record rather than live witnesses.

In any event, even assuming some confusion on this one point, was it of uch a nature as to make the trial a farce or a mockery of justice? Do not all

trials, particularly under our rules of evidence, have some element of confusion? Trial counsel tried to clear up any confusion, but admittedly due to the necessity of working through a translator, this was difficult. Is he to be held incompetent because of his witnesses' language problems? He tried. What else should he have done? Should he have recalled the defendant and opened him up to further cross-examination with all its pitfalls? Or should he have recessed the trial to subpoena other witnesses, which would have, of course, also given the government more time to procure witnesses to prove the defendant a liar? These questions show the fallacy in "second guessing" or "Monday morning quarter-backing" a trial attorney and indicate, certainly at least, that appellant has not carried his heavy burden of showing trial counsel so incompetent as to have made the trial a mockery of justice or a farce.

And even though trial counsel didn't object to clearly inadmissible hearsay, does this make him ineffective? Don't lawyers do this every day? As was said in Rivera v. United States, 318 F.2d 606,608 (9th Cir.1963),

> "Assuming that counsel erred . . . in failing to object to the admission of evidence, more is required to constitute denial of the effective assistance of counsel guaranteed by the Sixth Amendment."

In any event it would appear that appellant has attached too much significance to the brief hearsay here involved. Appellant's own witnesses

clearly rebutted and explained it, or at the very least, created a conflict for the jury to decide. It is the government's view that it was the inherent "fishy" nature of appellant's whole story, rather than this brief hearsay which constituted the crucial factor in this case.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MOBLEY M. MILAM